KELLEY DRYE & WARREN LLP
A LIMITED LIABILITY PARTNERSHIP

TYSONS CORNER
8000 TOWERS CRESCENT DRIVE
SUITE 1200
VIENNA, VIRGINIA 22182

(703) 918-2300

NEW YORK, NY
WASHINGTON, DC
LOS ANGELES, CA
CHICAGO, IL
STAMFORD, CT
PARSIPPANY, NJ

BRUSSELS, BELGIUM
HONG KONG

AFFILIATE OFFICES
BANGKOK, THAILAND
JAKARTA, INDONESIA
MUMBAI, INDIA
TOKYO, JAPAN

FACSIMILE
(703) 918-2450
www.kelleydrye.com

DIRECT LINE: (703) 918-2316
EMAIL: mhazzard@kelleydrye.com

March 10, 2003

BY ELECTRONIC SUBMISSION

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, NW
Washington, DC 20554

Re: WC Docket Nos. 02-384

Dear Ms. Dortch:

Pursuant to Section 1.1206(b)(2) of the Commission's Rules, Xspedius Management Co., LLC ("Xspedius"), through counsel, submits this notification of an oral ex parte meeting in the above-referenced proceeding on March 10, 2003 with Mathew Brill, Legal Advisor to Commissioner Abernathy. Jim Falvey and I attended the meeting on behalf of Xspedius. During the meeting the participants discussed the attachment materials regarding checklist item 13, reciprocal compensation.

Sincerely,

Michael B. Hazzard

Counsel to Xspedius Management Co., LLC

Attachments

cc: Mathew Brill (electronic mail)

DC01/HAZZM/202318.1

XSPEDIUS

Accelerated Communications

WC Docket No. 02-384

March 10, 2003

The 271 Legal Standard

- The BOC at all times bears the burden of proof of compliance with section 271, even if no party challenges its compliance with a particular requirement . *SWBT Texas 271 Order*, 15 FCC Rcd at 18374, ¶ 46.

- In demonstrating its compliance, a BOC must show that

  - it has a concrete and specific legal obligation to furnish the item upon request pursuant to state-approved interconnection agreements that set forth prices and other terms and conditions for each checklist item, *Bell Atlantic New York Order*, 15 FCC Rcd at 3973-74, ¶ 52), and

  - that it is currently furnishing, or is ready to furnish, the checklist items in quantities that competitors may reasonably demand and at an acceptable level of quality. *Id.*

Checklist Item 13

- Section 271(c)(2)(B)(xiii) of the Act obligates Verizon to pay reciprocal compensation to Xspedius and other CLECs for the transport and termination of local voice traffic in accordance with section 252(d)(2).

- Pursuant to section 252(d)(2)(A), Verizon must compensate Xspedius for the costs associated with the transport and termination of calls that Verizon sends to Xspedius:

  – "[A]ll LECs are obligated to bear the cost of delivering traffic originating on their networks to interconnecting LECs' network for termination." *Virginia Arbitration Order*, ¶ 67.

  – The Commission's implementing rules regarding reciprocal compensation expressly permit carriers, such as Xspedius, to recover from Verizon "the costs of the proportion of trunk capacity used by [Verizon] to send traffic" to Xspedius. 47 C.F.R. § 51.709(b).

- There is nothing new about this obligation.

Compliance requires obligation and performance – not obligation and a refusal to perform.

Verizon Cannot Satisfy Checklist Item 13

- In spite of a specific, concrete obligation, Verizon has refused to pay undisputed facilities charges for the transport and termination of local traffic, and therefore cannot satisfy checklist item 13.

- Verizon is currently in arrears on such payments in the amount of $2,296,467.36. Verizon has submitted disputes totaling $243,702.33, and accordingly owes Xspedius approximately $2,052,765 in **undisputed** local interconnection transport charges.

- Verizon has never raised a legal or factual argument, other than the disputes just referenced, as to why it should not pay these charges. Verizon has paid these charges in the past, albeit often only after litigation.

- Xspedius has made repeated written demands for payment of these Maryland and D.C. charges in recent weeks but has not received payment.

- Without actual payment, Verizon cannot satisfy Checklist Item 13.

What's sport for the boy is life and death for the frog.

December 13, 2001

Darius B. Withers, Esq.
Kelley, Drye & Warren, LLP
1200 19th Street, N.W.
Suite 500
Washington, D.C. 20036

David A. Hill, Esquire
Vice President & General Counsel
Verizon Maryland, Inc.
One East Pratt Street, 8E
Baltimore, Maryland 21202

Dear Messrs. Withers and Hill:

On November 7, 2001, e.spire Communications Inc. ("e.spire") filed a Complaint and Motion for Expedited Review with the Public Service Commission ("Commission"). E.spire alleges that Verizon Maryland, Inc. ("Verizon") is violating a Commission Order[1] by withholding reciprocal compensation payments for Internet Service Provider ("ISP") bound traffic. E.spire contends that the Commission's June 13, 2001 Order clearly established that Verizon could not "unilaterally" implement the Federal Communications Commission's ("FCC") *ISP Remand Order*[2] by withholding payment for ISP-bound traffic.

E.spire contends that the Commission's Order did not only pertain to Core Communications, but was in response to a request for an interpretation of the FCC's *ISP Remand Order*. E.spire requests the following relief:

> 1. require Verizon to remit payment electronically within 24 hours by wire transfer for the full amount of reciprocal compensation, plus interest and late payment fees;

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[1] June 13, 2001 Letter from Felecia L. Greer, Executive Secretary, Maryland Public Service Commission to Michael B. Hazzard, Kelley Drye & Warren, LLP and David A. Hill, Vice President and General Counsel, Verizon Maryland, Inc.

[2] *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Inter-Carrier* Compensation *for* ISP-*Bound Traffic,* FCC 01-131, CC Docket Nos. 96-98, 99-68, 16 FCC Rcd 9151 (rel. Apr. 27, 2001) ("*ISP Remand Order*").

> 2. direct Verizon to continue to pay e.spire reciprocal compensation for ISP-bound traffic pursuant to the terms of the parties interconnection agreement until an amendment is executed by the parties and approved by the Commission;
>
> 3. sanction Verizon for its willful disregard of the Commission's Order; and
>
> 4. refuse to approve any Verizon 47 U.S.C. Section 271 application until Verizon has proven compliance with all Commission Orders for a period of 18 months prior to Verizon's application.

Verizon filed a response on December 6, 2001. Verizon claims that the Commission Order at issue only pertains to Core Commissions and is not applicable to all Maryland Competitive Local Exchange Carriers ("CLECs"). Verizon also submitted a counterclaim requesting that the Commission approve its proposed amendment to its interconnection agreement with e.spire. Verizon contends that e.spire is placing additional and unlawful requirements on Verizon's ability to implement the FCC *ISP Remand Order*. Verizon contends that it has attempted to negotiate an amendment to the agreement for the last five months. E.spire filed a Reply on December 10, 2001.

The Commission has carefully reviewed the filings submitted by both parties. The Commission notes that Verizon's response fails to offer any argument regarding why the legal analysis in the June 13th Order is not equally applicable to e.spire's Complaint. Verizon's withholding of reciprocal compensation is simply a continuation of its policy of ignoring the FCC's clear directive that the intercarrier compensation mechanism only applies prospectively. In this regard, the FCC specifically stated:

> The interim compensation regime we establish here applies as carriers re-negotiate expired or expiring interconnection agreements. It does not alter existing contractual obligations, except to the extent that parties are entitled to invoke contractual change-of-law provisions. This Order

> does not preempt any state commission decision regarding compensation for ISP bound traffic for the period prior to the effective date of the interim regime we adopt here.[3]

Verizon offers no explanation for its decision to ignore the clear impact of the FCC *ISP Remand Order*, other than to claim that e.spire was not a party to the Core petition. Verizon fails to cite any language in the e.spire agreements which would warrant a different result.

Based on the foregoing analysis, the Commission hereby grants, in part, e.spire's Complaint.[4] Verizon is directed to remit a payment of $1,500,000 electronically by wire transfer to e.spire by close of business Monday, December 17 2001. Furthermore, Verizon is prohibited from withholding reciprocal compensation payments until amendments to the agreement are approved by the Commission.

The Commission agrees with Verizon that attempts to negotiate an amendment to this and other interconnection agreements have simply continued for far too long. Therefore, the Commission directs both Verizon and e.spire to file proposed amendments by December 21, 2001. The Commission will delegate this matter to the Hearing Examiner Division for expedited review and approval of an amendment to the interconnection agreement.

Finally, the Commission must address Verizon's refusal to pay other CLECs reciprocal compensation prior to amending individual interconnection agreements. Verizon's failure to cite to any specific language in the e.spire agreements which warranted a different application of paragraph 82, leads the Commission to at least question whether any of Verizon's agreements warrant a different interpretation. Therefore, the Commission hereby directs Verizon to file by December 21, 2001 a listing of those CLECs which Verizon is refusing to pay reciprocal compensation for ISP-bound

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[3] *ISP Remand Order*, para. 82.

[4] E.spire cites no contract provision which would entitle the Company to interest and late fees, thus the Commission denies this request. With regard to penalties, the Commission will not sanction Verizon at this time but may reconsider this decision should these payment problems continue. The Commission also denies e.spire requested relief with regard to any future Verizon Section 271 filing.

traffic along with the contract provisions which they interpret as justifying withholding of payments. The Commission will review this filing for compliance with the FCC *ISP Remand Order*.

By Direction of the Commission,

Felecia L. Greer
Executive Secretary